



DEFENSE INTELLIGENCE AGENCY
WASHINGTON, D.C. 20301

8 APR 1976

U-52,300/DS-6

MEMORANDUM FOR THE CHAIRMAN, UNITED STATES INTELLIGENCE BOARD

SUBJECT: Secrecy Agreements for Intelligence Sources and Methods

1. I have watched with interest the efforts of the United States Intelligence Board Security Committee (USIB SECOM) working group to produce a Director of Central Intelligence Directive (DCID) which will satisfy the Director of Central Intelligence's (DCI's) responsibility under Section 7.a. of Executive Order 11905. A consensus appears to have been reached as to minimum requirements for the secrecy agreement, but a serious problem has arisen as to the scope of the material to be encompassed by the agreement.

2. The Central Intelligence Agency (CIA) membership is pressing for the inclusion in the agreement of both classified and unclassified intelligence information containing sources and methods. DIA cannot support or endorse any secrecy agreement which purports to restrict a DoD employee's use of unclassified information. A number of cogent reasons necessitate this position.

3. The secrecy agreement is intended to serve one basic purpose - protection of intelligence sources and methods by three means:

- a. A psychological deterrent.
- b. Provide a contractual basis for prepublication judicial restraint.
- c. Administrative and disciplinary action against violators of the agreement.

Each of the methods contains sub silentio certain inherent requirements in order to be successful. In addition, administrative convenience recommends the use of a single piece of paper which would include all aspects of an agency's secrecy agreement.

4. For a psychological deterrent to be effective, it must be creditable, logical and reasonable. Prior judicial restraint as enunciated in the leading case (U.S. v. Marchetti) requires a contractual relationship containing consideration and which, for constitutional reasons, is limited to classified material. Adverse administrative action or disciplinary action against a government employee must be reasonable and is subject to certain administrative due process requirements. In this

regard it must not be forgotten that only a minority of the Executive Branch employees fall within the excepted service category or are in some fashion exempt from the protection afforded by the Constitution, civil service or military regulations from arbitrary and capricious agency action including termination of employment.

5. While neither your statutory responsibility to protect intelligence sources and methods nor Executive Order 11905 speak specifically of "classified" sources and methods only, it is believed that this is clearly implied. The need for protection of sources and methods is founded on their relationship with national defense and foreign relations. This is the criteria for classification of information established by the President in Executive Order 11652. A strong argument can be made that Executive Order 11652 is the exclusive means available for the protection of information of this type. Any attempt to protect unclassified sources and methods by means of a secrecy agreement could be considered as second classification system which would of course be contrary to the prohibition contained in Executive Order 11652. In view of the Fourth Circuit U.S. Court of Appeals holding in *U.S. v. Marchetti*, it is believed that any effort on the part of the government to seek a prepublication restraining order of unclassified sources and methods would be doomed to failure from the outset.

6. When Executive Order 11905 is viewed in the context of the remarks made at the White House press conference by Mr. Marsh at the time the Executive Order was made public, the intent of Section 7.a. appears to be simply to insure that secrecy agreements would be used throughout the Executive Branch and nothing more. A review of Attorney General Levi's remarks on the same occasion with regard to the accompanying White House sponsored legislation suggests that the purpose of the legislation was to provide a punitive sanction to run concurrently and coextensively with the civil remedy which would be available as a result of the Section 7.a. agreement. The legislation specifically refers to "properly classified and designated" intelligence sources and methods. We can find no indicia of Presidential intention to introduce any novel concepts or to deviate from the generally recognized, accepted and understood practices and procedures for the safeguarding of information "which bears directly on the effectiveness of our national defense and the conduct of our foreign relations."

7. From the purely practical point of view:

a. DoD has no unclassified sources and methods which require protection by means of a secrecy agreement.

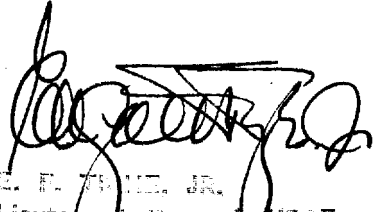
b. DoD could not in good conscience justify protection of unclassified sources and methods in the federal courts.

c. The imposition of such a requirement by DCI would prove highly embarrassing to the Department in that it has neither the personnel rules and regulations nor the procedures for supporting the full implication of the requirement, nor does it feel that they could be obtained.

d. Should an occasion present itself when the Department was forced to act on such a basis, it would be subjected to public, press and Congressional and probably judicial criticism that it would just as soon avoid.

e. The imposition at this time of requirements which would not be enforceable throughout the Executive Branch could only serve to further degrade the credibility of our security system.

8. Finally, the DoD General Counsel concurs with me and my General Counsel in the belief that Section 7.a. of Executive Order 11905 requires only the publication of a DCID which will prescribe minimum standards for a secrecy agreement. Agencies and departments of the Executive Branch would be free to impose such additional requirements as might be needed by individual situations. Since there is unanimity of opinion that Executive Order 11905 did anticipate the protection of classified sources and methods, the impending deadline and the novelty of the CIA position, it is recommended that the DCID be limited in scope to classified sources and methods and the breaking of new ground be saved for a later date.



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Acting Director